

**Filed 3/21/00 by Clerk of Supreme Court
IN THE SUPREME COURT
STATE OF NORTH DAKOTA**

2000 ND 52

Joel J. Bleth,

Plaintiff and Appellee

v.

Janet S. Bleth,

Defendant and Appellant

No. 990284

Appeal from the District Court of Stark County, Southwest Judicial District,
the Honorable Allan L. Schmalenberger, Judge.

AFFIRMED.

Opinion of the Court by Sandstrom, Justice.

Michael J. Maus of Hardy, Maus & Nordsven, 137 First Avenue West, P.O.
Box 570, Dickinson, N.D. 58602-0570, for plaintiff and appellee.

Joseph H. Kubik of Kubik, Bogner, Ridl & Selinger, 26 East Third Street, P.O.
Box 1173, Dickinson, N.D. 58602-1173, for defendant and appellant.

Bleth v. Bleth

No. 990284

Sandstrom, Justice.

[¶1] Janet Bleth appeals from an order amending the judgment of the Southwest Judicial District Court. We affirm.

I

[¶2] Joel Bleth and Janet Bleth were divorced on June 5, 1990. Janet Bleth was awarded custody of the parties' three minor children, and Joel Bleth was ordered to pay child support. When the parties' eldest child reached majority, Joel Bleth moved to reduce his child support obligation. His monthly payment was subsequently reduced.

[¶3] Joel Bleth is employed by Pump Systems, Inc., a corporation he founded with a partner. The corporation has eleven other stockholders. Joel Bleth and his partner each own 40.3 percent of the company.

[¶4] For the fiscal year ending November 30, 1998, Pump Systems, Inc., had an income of \$96,659. In addition, the corporation retained net earnings of \$64,842, resulting in a total of \$627,572 in unappropriated retained earnings.

[¶5] When the parties' second child reached majority, Joel Bleth brought the present action to again reduce his child support obligation. The district court, in reducing his obligation, did not attribute any of Pump Systems, Inc.'s retained earnings to Joel Bleth, and it calculated his obligation using only his gross income of \$61,809.69.

[¶6] Janet Bleth timely appealed the district court's order amending its earlier judgment. N.D.R.App.P. 4(a). The district court had jurisdiction under N.D.C.C. § 27-05-06. This Court has jurisdiction under N.D. Const. art. VI, § 6, and N.D.C.C. § 28-27-01.

II

[¶7] The sole issue on appeal is whether the district court erred in excluding Pump Systems, Inc.'s income or retained earnings in calculating Joel Bleth's gross income for child support purposes. Janet Bleth argues a portion of Pump Systems, Inc.'s taxable income or retained earnings should be included in Joel Bleth's gross income because he has a significant amount of control over the corporation's decision to

retain or distribute earnings. She argues Joel Bleth “should not be allowed to accumulate income in his corporation to be taken at a later date when his support obligation has expired.”

A

[¶8] “Child support determinations involve questions of law which are subject to the de novo standard of review, findings of fact which are subject to the clearly erroneous standard of review, and may, in some limited areas, be matters of discretion subject to the abuse of discretion standard of review.” Buchholz v. Buchholz, 1999 ND 36, ¶ 11, 590 N.W.2d 215. “A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if no evidence exists to support it, or if, on the entire record, we are left with a definite and firm conviction that a mistake has been made.” Id. (citations omitted).

B

[¶9] When an obligor is the sole stockholder of a corporation and determines his or her own salary, the corporation’s income may be considered in determining the obligor’s earning capacity. Quamme v. Bellino, 540 N.W.2d 142, 146 (N.D. 1995) (in the case of self-employment, “the administrative code requires consideration of the gross income of the business, rather than what an individual chooses his personal ‘income’ to be”); N.D. Admin. Code § 75-02-04.1-05. The district court should then consider not only salary, but also the corporation’s earnings, life insurance paid by the corporation, and other benefits provided by the corporation. Quamme, at 146 (citations omitted).

[¶10] Other jurisdictions have imputed income to an obligor with significant control over earnings of a corporation, such as a sole stockholder. See, e.g., Merrill v. Merrill, 587 N.E.2d 188 (Ind. Ct. App. 1992). See also Annotation, Divorce and separation: attributing undisclosed income to parent or spouse for purposes of making child or spousal support award, 70 A.L.R. 4th 201, §§6-7 (1989 & Supp. 1999). The less control the obligor has over the retained earnings, however, the more reluctant courts have been to impute corporate income to a stockholder obligor. See M. Kyle Rominger, Note, Valuing S Corporation Earnings in Child Support Calculations, 35 U. of Louisville J. of Fam. L. 145 (1996-97).

[¶11] In this case, no evidence was presented and no offer of proof made to the district court regarding Joel Bleth’s control of the distribution of the corporation’s

retained earnings. Further, there was no evidence presented and no offer of proof showing Pump Systems, Inc.’s retention of earnings was inappropriate.¹

[¶12] To prevail on appeal, an issue must be appropriately raised in the district court, and a record created for informed appellate review. State v. Osier, 1999 ND 28, ¶ 14, 590 N.W.2d 205 (citing Beavers v. Walters, 537 N.W.2d 647, 652 (N.D. 1995)); Gorsuch v. Gorsuch, 392 N.W.2d 392, 394 (N.D. 1986). This Court is unable to review the issue in the absence of evidence or an offer of proof. Gorsuch, at 394; Estate of Kjorvestad, 375 N.W.2d 160, 167 (N.D. 1985). See State v. Lang, 378 N.W.2d 205 (N.D. 1985) (appellant was not unlawfully precluded from presenting competent evidence to establish justification for conduct where he failed to present evidence and made no offer of proof to substantiate his position); State v. Flohr, 301 N.W.2d 367 (N.D. 1980) (regardless of whether the district court suspects the proof to be offered is ultimately inadmissible, a record preserving the offer and the ruling is necessary for this Court to review the ruling).

[¶13] Because necessary evidence was not presented and no offer of proof was made, the record is inadequate to raise the issue Janet Bleth presents on appeal.

C

[¶14] Joel Bleth requests costs and attorney’s fees because of the “complete absence of any law to support” Janet Bleth’s argument. Because her appeal is not frivolous, Joel Bleth’s request for attorney’s fees and costs on appeal, except for costs allowed under N.D.R.Civ.P. 39, is denied.

III

[¶15] The order amending the judgment is affirmed.

[¶16] Dale V. Sandstrom
William A. Neumann
Mary Muehlen Maring
Carol Ronning Kapsner
Gerald W. VandeWalle, C.J.

¹Neither party argues that the issue on appeal is Joel Bleth’s increased ability to pay child support under N.D. Admin. Code § 75-02-04.1-09(2)(g). No evidence or offer of proof relating to Joel Bleth’s increased ability to pay child support under N.D. Admin. Code § 75-02-04.1-09(2)(g) was presented.